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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 481

ELLIS CARP, *et al.*,

Appellants,

—v.—

TEXAS STATE BOARD OF EXAMINERS IN OPTOMETRY, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

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In the

Supreme Court of the United States

October Term, 1967

No. .....

Ellis Carp, *et al.*,

Appellants,

—v.—

Texas State Board of Examiners in Optometry, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

Appellants, Dr. Ellis Carp, Dr. S. J. Rogers, and Dr. N. J. Rogers, appeal from a final judgment of the Supreme Court of the State of Texas and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Texas in the decision appealed from is reported at 412 S.W.2d 307 (1967), together with the dissenting opinion in that case; both opinions are reprinted in Appendix A to this Statement, p. 1a, *infra*. The opinion of the Court of Civil Appeals of Texas is reported at 401 S.W.2d 639 (1966), and is reprinted in Appendix A, p. 27a, *infra*.

The opinion of the Supreme Court of Texas in a case related to the decision here appealed from—involving a

request by the Texas State Board of Examiners in Optometry and others for a writ of mandamus directed to the trial court in the present case—is reported at 388 S.W.2d 409 (1965), along with the dissenting opinion. These opinions are reprinted in Appendix A, p. 39a, *infra*.

JURISDICTION

This suit was brought to secure a judgment declaring invalid a rule adopted by the Texas State Board of Examiners in Optometry. The judgment of the Supreme Court of Texas was entered on February 8, 1967, and a timely motion for rehearing was denied on March 29, 1967*; notice of appeal to the Supreme Court of the United States was filed in the Texas Supreme Court on June 13, 1967.

The jurisdiction of this Court to review the decision by direct appeal is invoked under 28 U.S.C. § 1257(2) (1964); the rule here in question is clearly legislative in nature, and hence is to be treated as a "statute of [a] state" for purposes of that section.** Should the Court determine that the constitutional issues presented herein are not properly appealable, they should be considered as if contained in a petition for certiorari. 28 U.S.C. § 2103 (1964).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The regulation here challenged as invalid is the Professional Responsibility Rule adopted on December 21, 1959,

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* See App. B, pp. 63a-64a, *infra*.

** See, *e.g.*, *Lathrop* v. *Donohue*, 367 U.S. 820 (1961); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934); *Live Oak Water Users' Ass'n* v. *Railroad Comm'n*, 269 U.S. 354 (1926).

by the Texas State Board of Examiners in Optometry. Two other regulations of that Board, both adopted at a meeting convened on June 30, 1957, are involved: first, a resolution establishing an Advisory Committee of optometrists; and second, a Rule Making Procedure Rule. The Board's authority to enact rules governing the practice of optometry stems from Article 4556, Texas Revised Civil Statutes.* The full texts of the state regulations involved and the underlying statute are set out in Appendix C, p. 65a, *infra*.

The validity of the Professional Responsibility Rule is challenged on the basis of the due process clause of the fourteenth amendment, U.S. Const. amend. XIV, § 1, the supremacy clause, U.S. Const. art. VI, and the Sherman Act, sections 1 and 2, 15 U.S.C. §§ 1, 2 (1964).

QUESTIONS PRESENTED

1. When a profession within a state is divided into two competing groups with conflicting economic interests, one of which comprises a large majority of the profession, is it consistent with due process of law for the minority group's business to be destroyed by means of a rule drafted by an unofficial body of private practitioners, where no official authority of the state exercises its judgment as to the rule's desirability, but instead the rule is adopted simply on the basis of an approval in an election by a specified majority of the profession?

2. Where a profession is thus split into majority and minority factions with conflicting economic interests, is it reasonable and consistent with due process of law for a state regulatory board to adopt a rule destroying the

* All statutory references, unless otherwise noted, are to Texas Revised Civil Statutes (Tex. Rev. Civ. Stat.).

business of the minority group solely on the basis of a presumption that any proposed regulation favored by two-thirds of the profession's members is reasonable and in the public interest?

3. Can an administrative rule prohibiting the type of practice engaged in by a minority group within a regulated profession and affecting interstate commerce be held valid under the due process and supremacy clauses despite the fact that the members of the administrative agency who voted to adopt the rule were acting pursuant to a conspiracy with the majority faction of the profession to destroy the business of the minority?

STATEMENT OF THE CASE

This case arises out of the competition that has long existed in Texas between "multiple-office" and "independent" practitioners of optometry. For many years the latter faction, comprising a substantial majority of the profession, has attempted by various means to put the Appellants —who maintain the largest and most significant multiple-office practices in the state—out of business. The Professional Responsibility Rule here at issue represents the culmination of that campaign. This Statement will show that the Rule was adopted without the exercise of any official judgment that its provisions would benefit the people of Texas, but that effective responsibility for its enactment was instead delegated to and exercised solely by the private optometrists of the state. The majority of independent practitioners were free to impose whatever restraints they chose upon their less numerous multiple-office competitors. In these circumstances it is hardly surprising that the result of the Rule's application will be the total destruction of Appellants' multiple-office practice.

1. ***Optometry Practice in Texas***

The majority faction of Texas optometrists, practicing independently in individual offices, has long had economic interests in conflict with those of practitioners who engage in multiple-office practice. Under the latter method of practice, numerous offices throughout the state are owned and managed by a single optometrist or group of optometrists, and other licensed practitioners are employed to staff the various offices thus maintained. At each such office customers may receive optical examinations conducted by the licensed optometrist in charge and may obtain prescribed spectacles. This method of practice makes possible substantial cost savings, and the competition thus created serves to keep prices significantly below those which prevail in areas where multiple-office practice does not exist. S.F. 162-64.*

Appellants are licensed optometrists who maintain the most substantial multiple-office practices in Texas. Drs. S. J. and N. J. Rogers have operated their business under the trade name "Texas State Optical" since 1939 and at the time of trial maintained 82 offices in numerous locations throughout the state. Dr. Carp has been in business since 1939 and operated at the time of trial 71 offices under several trade names. The Appellants have invested large sums in leases, equipment, and the development of good will and have competed vigorously with each other and with other optometrists in the state. S.F. 31-33, 43-52, 162-64, 1595-1608, 3233.

Because of such efforts on the part of Appellants and because of the cost advantages of their method of practice,

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* References to "S.F." are to specific pages of the "Statement of Facts"—the court reporter's transcript of the evidence introduced in the trial court.

the independent practitioners, through their professional organization—the Texas Optometric Association (TOA), have over the years repeatedly attempted to eliminate the competition generated by that method of practice. An effort was made in 1939, for example, to secure legislation which would prohibit the use of trade or assumed names; these proposals were rejected, however, by the Texas legislature. Appendix A, p. 13a; 412 S.W.2d at 313. Since that time, the TOA has periodically engaged in comparable activity with similar aims.*

2. *Adoption of the Professional Responsibility Rule*

The Texas legislation concerning optometry regulation, insofar as it is pertinent here, has remained unchanged since 1939. It establishes the Texas State Board of Examiners in Optometry, all of the members of which must be practicing optometrists, Tex. Rev. Civ. Stat. art. 4554, and authorizes the Board to make regulations, "not inconsistent" with the statutory scheme as a whole, concerning the practice of optometry. Tex. Rev. Civ. Stat. art. 4556. At all pertinent times, five of the six members of the Board were independent practitioners and members of the TOA. Tr. 8;** S.F. 70-71.

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* In 1951, for instance, the TOA appeared as *amicus curiae* in a suit involving Appellants Rogers and the Southwestern Bell Telephone Company, in order to argue that Texas State Optical was not entitled to be listed in the classified directory under the title "Optometrists." See *Southwestern Bell Telephone Co.* v. *Texas State Optical Co.*, 253 S.W.2d 877 (Tex. Ct. Civ. App. 1952). See also the opinion of the Court of Civil Appeals, App. A, p. 33a, 401 S.W.2d at 643; S.F. 85-93. And shortly after the contentions thus advanced were rejected by the state court, further efforts—likewise unsuccessful—were made by independent practitioners to secure legislation prohibiting trade name practice. Opinion of the Court of Civil Appeals, App. A, p. 33a, 401 S.W.2d at 643; S.F. 128-35.

** References to "Tr." are to specific pages in the clerk's transcript of the proceedings in the trial court, including motions, pleadings, stipulations, etc.)

At one meeting in 1957 the Board took two steps which laid the foundation for adoption of the Rule challenged here. S.F. 2837.

First, without specific legislative authorization, the Board set up an Advisory Committee of individual optometrists, consisting of one optometrist from each of the state's legislative districts, each to be appointed by the state legislator representing the district in question. Appendix C, p. 72a. No provision of Texas law required that the members of the Committee, most of whom were independent practitioners, take an oath of office; nor was any compensation provided for. At no place in the record is it suggested that an oath was administered to the Committee or that its members were compensated by the state in any way.

Second, the Board of Examiners at the same meeting adopted, also without specific legislative authorization, a Rule Making Procedure Rule, which provided that any proposed rule approved by a two-thirds vote in which a majority of the state's optometrists participated would be considered by the Board to be "prima facie" reasonable and in the public interest. This Rule further prohibited the adoption by the Board of any rule that did not receive such approval and provided that rules proposed by twenty-five percent of the optometrists of the state would automatically be submitted to a vote of the optometrists. Appendix C, p. 71a.

The Advisory Committee proceeded to hold a meeting, at which it voted to recommend to the Board adoption of the Professional Responsibility Rule in substantially the form set out in the Appendix C, p. 66a, and challenged here. S.F. 2800. Various provisions of the Rule prohibited practices designated as "fee splitting" and "assumed name prac-

tice," and the Rule as a whole was plainly and effectively designed to accomplish its admitted objective—the outlawing of Appellants' multiple-office practices. The record contains no suggestion that a hearing or investigation of any sort was conducted by the Committee, and no rationale for the adoption of the Rule, or explanation of how it would serve the public interest, was offered.

The President of the Board, following the Rule Making Procedure Rule, automatically submitted the proposed Professional Responsibility Rule to a vote of the state's practicing optometrists; he informed the Board at its next meeting that the Rule had been so submitted "as set forth in the board's rules of procedure." S.F. 2809. No specific decision had been made by the Board to put the Rule to a vote. Nor had any consideration been given to the reasonableness of or need for the Rule.*

The proposed Rule was, not surprisingly, approved by the signed ballots of well over two-thirds of the optometrists expressing an opinion.** The Board then, admittedly acting in accordance with its Rule Making Procedure

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*In 1954 there had been some deliberation concerning a proposed regulation with provisions similar in certain respects to those of the Professional Responsibility Rule here in question. This deliberation cannot be asserted to justify the Board's action on the Professional Responsibility Rule. The 1954 proposal was repealed after adoption when the Attorney General of Texas advised against its constitutionality. S.F. 307-09. Even apart from the lapse of five years and the fact that the Professional Responsibility Rule was an entirely separate regulation originating independently of any past proposals, the Board never purported to act on the basis of its earlier deliberations. It polled the state's optometrists, not on the basis of any decision as to the merits of the 1959 Rule, but rather automatically under the terms of its Rule Making Procedure Rule. S.F. 2809; Tr. 111.

**Of the 578 optometrists voting (slightly less than two-thirds of the profession), 542 favored the Rule. S.F. 2843.

Rule,* proceeded to adopt the Rule as approved. During the meeting at which the Rule was enacted, on December 21, 1959, the Board once again neither presented nor heard any evidence designed to show that the Rule's provisions were necessary or even reasonable.** S.F. 814-16. Adoption of the Rule was based on nothing more than the presumption of reasonableness derived from the optometrists' approval of its terms.

3. *What the Rule Does*

What the Rule does and does not accomplish should be kept clear. Its provisions are not designed to deal specifically with the various undesirable practices which Appellees have suggested throughout this litigation in attempts to give the Rule a hue of reasonableness. Rather, the Rule outlaws only the general structure of Appellants' practice, in which trade names and multiple offices are utilized, regardless of the character of the optometrists involved or the propriety of their professional conduct.***

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* Appellees have so stipulated. Tr. 111.

** The Board did allow Appellants to appear before it and argue that the Rule should not be adopted. See note, p. 17, *infra*.

*** Specifically, the Rule forbids an optometrist from dividing fees for optometric services with another optometrist "except upon a division of service or responsibility." App. C, p. 67a. It further prohibits an optometrist from using in connection with his practice, a name other than his own. Also, it forbids an optometrist from allowing the use of his name on any sign in an optometry office "unless said optometrist is actually present and practicing optometry therein during the hours such office . . . is open to the public for the practice of optometry." App. C, p. 68a. Similarly, an optometrist may not practice in an office with a sign bearing another's name indicating that the office is "owned, operated, supervised, staffed, directed or attended" by the other if the other is not actually present. The Rule defines "actually present" as being physically present for half the number of hours the office is open during each month for at least nine months each year or as

Some of the practices to which the Appellees have pointed in attempting to justify the Rule are clearly insufficient for this purpose: if the practices had in fact been engaged in, the Board would have had ample authority under both statutory prohibitions of fraudulent practices, Tex. Rev. Civ. Stat. arts. 4563(b), 4565g, and the Board's own "Basic Competence" Rule, S.F. 2731, to take direct action against the individuals involved. Significantly, however, no such action has been taken. Conduct not already prohibited on the other hand, could easily be made the target of further specific regulations.

With regard to practices already prohibited, the Professional Responsibility Rule is of course unnecessary. With respect to practices not previously prohibited, the Rule's approach is interestingly discriminatory: optometrists practicing individually are still perfectly free to engage in such practices, while the Appellants' entire method of practice is prohibited wholesale, without regard to whether any of the undesirable acts are committed. Thus, Appellees' allusions to such specific undesirable practices as justifications for the Rule can hardly be persuasive.

4. *History of These Proceedings*

Faced with the destruction of their businesses, Appellants sought a judgment in the 101st District Court of Dallas County, Texas, declaring invalid the Professional Responsibility Rule.* The federal questions, concerning which re-

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being physically present at least half the time the person conducts any practice of optometry.

Obviously, the Rule will have a specific effect on those using trade names and having more than two offices, i.e., multiple-office practitioners such as Appellants.

*At the time the Rule was adopted there was pending in the state court referred to above a suit to which the Board and the

view by this Court is sought, were raised and argued before the trial court in timely fashion, having been first presented in the Appellants' First Amended Original Petition. Tr. 8-10, 13-14, 20-21, 21-26, 27-28.

After submitting numerous questions to the jury, on none of which the members of the jury were able to agree, the trial judge on May 24, 1964, declared a mistrial. The Board then sought a writ of mandamus in the Supreme Court of Texas, asking that the trial judge be compelled to set aside his order declaring a mistrial and to enter a final judgment determining the validity of the Rule. The Texas Supreme Court, one justice dissenting, granted the writ as prayed for, holding that the issues in question—concerning the authority of the Board and the validity of the Rule—were questions of law for the trial judge to determine. That court further held that Appellants' allegations of a conspiracy in restraint of trade among the optometrists of the state and the members of the Board, with the purpose of putting Appellants out of business, were insufficient as a matter of law to affect the validity of the Rule, so that questions relating to those allegations were not to be determined by the trial court. Appendix A, pp. 45a-52a; 388 S.W.2d at 413-17. Rehearing, sought in timely fashion by Appellants, was denied on April 7, 1965.

The trial court then proceeded to judgment, sustaining the Rule against all statutory and constitutional challenges not disposed of by the state supreme court. Tr. 151-59. This decision was appealed to the Texas Court of Civil Appeals for the Fifth Supreme Judicial District of the

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Appellants were parties. On December 22, 1959, Appellant Carp filed an amended petition challenging the validity of the Rule. The action was restyled *Ellis Carp, et al.* v. *Texas State Board of Examiners, et al.*, and Appellants Rogers became co-plaintiffs, also challenging the validity of the Rule.

state, where the remaining constitutional issues urged herein were properly raised and argued. (Brief for Appellants in the Court of Civil Appeals, pp. 72-94.) In a decision rendered March 25, 1966, the Court of Civil Appeals reversed the trial court's decision, finding that in adopting the Professional Responsibility Rule the Board had exceeded the powers statutorily delegated to it. Appendix A, p. 27a; 401 S.W.2d 639. That court also undertook to pass upon Appellants' constitutional claims, asserting most of them to be unmeritorious. Appendix A, pp. 37a-38a; 401 S.W.2d at 644-45. Appellants' motion for rehearing urged all points which had not been sustained by the court; on April 15, 1966, that motion was denied.

A writ of error was then sought by Appellees from the Supreme Court of Texas. Under a procedure authorized by Texas law, the Appellants also applied to that court for a conditional writ of error, allowing consideration of their constitutional arguments in the event that Appellees' request for review was granted. Those federal questions here in issue that had been before the Court of Civil Appeals were properly raised by this conditional application. The application has, however, never been passed upon by the Texas Supreme Court in any manner whatsoever—despite the fact that Appellees were granted the writ of error they sought.

During the proceedings on Appellees' writ of error, the Texas Supreme Court thus had full notice of the presence in this case of every federal question now argued—with the exception, of course, of those which that court had disposed of in the earlier mandamus action. The issues were briefed at considerable length in the conditional application for writ of error. Appellants' decision not to brief certain of the issues still further as "cross-points"

in the state supreme court is therefore irrelevant to the preservation of those issues. The mere failure to brief for a second time a point which had clearly and fully been brought to the attention of that court can in no way be deemed a waiver of the point.* Appellants thus have done all that is necessary to preserve throughout this litigation the federal constitutional questions now presented to this Court.

The Texas Supreme Court reversed the judgment of the Court of Civil Appeals, holding that the Rule was within the statutory powers of the Board of Examiners and that the Rule was supported by substantial evidence. One justice dissented from this judgment. Appendix A, p. 15a; 412 S.W.2d 307. Appellants' motion for rehearing by the Supreme Court of Texas was denied on March 29, 1967. Appendix B, p. 64a.

THE QUESTIONS ARE SUBSTANTIAL

For the following reasons, Appellants contend that the questions presented are substantial and that plenary consideration by this Court, with briefs on the merits and oral argument, is required for their resolution.

I. THE RULE, BECAUSE OF THE PROCEDURES BY WHICH IT WAS ADOPTED, DEPRIVES THE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The crucial fact upon which the unconstitutionality of the Professional Responsibility Rule rests is that it originated with, was drafted by, and was established by private

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* Under Texas law, in fact, failure to press a constitutional question at a particular stage of litigation does not effect a waiver. See 4 Tex. Jur. 2d 234, § 740 (1959); *Sid Westheimer Co.* v. *Piner*, 263 S.W. 578 (Tex. Comm'n App. 1924).

members of the optometry profession in Texas, rather than by any state body or agency officially concerned with the public interest. The members of this private group—individuals with a clear economic self-interest and a demonstrated, organized hostility to optometrists competing with them through multiple-office practice—found themselves free to impose their will on their competitors and to drive them out of business. The wisdom, necessity, and reasonableness of the Rule by which these ends were accomplished, and through the operation of which Appellants stand to lose huge sums invested in their businesses, were neither apparent nor explained; and, most significantly, they were never passed upon by any official state authority.

A. The Rule Was Adopted by Economically Interested Private Persons and Without Any Act of Judgment by Officials Concerned With the Public Interest.

This Court made it clear in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), that it is inconsistent with due process of law for some of the members of a business or profession, not required to exercise their judgment in the public interest, to be clothed with authority to impose their will on the remainder of that business or profession. In *Carter Coal*, certain provisions of the Bituminous Coal Conservation Act of 1935 were declared inconsistent with the due process clause of the fifth amendment. These provisions in effect made mandatory, for all members of the coal industry, whatever wage and hour agreements might be entered into by producers of a specified proportion of the nation's (or a particular area's) coal and a majority of employees in the area in question. "[O]ne person," the Court emphasized, "may not be entrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311.

The principle thus enunciated is plainly sound. Such power would give the force of law to decisions motivated solely by private gain, regardless of public policy and in violation of the standards of government guaranteed by the fourteenth amendment's due process clause. This conclusion has special force when an interest as vital as the right to engage in a profession is at stake.*

The principle expressed in *Carter Coal* cannot be limited to matters involving the distribution of power within the federal government; its foundation of fairness is far too fundamental. In *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *Richmond*, 226 U.S. 137 (1912),** —in the context of real estate zoning restrictions the operation of which was left to the discretion of private individuals—this Court specifically found the principle embodied in the guarantees of the fourteenth amendment.*** Indeed, there is a sound basis for main-

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* *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Truax* v. *Raich*, 239 U.S. 33 (1915).

** Criticism which may be directed at the *Carter*, *Roberge*, and *Eubank* cases should be carefully weighed. Certain aspects of those decisions may, it is true, be regarded skeptically. The Court's approach to the interstate commerce question in *Carter*, for instance, cannot be reconciled with more recent opinions. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). And wider latitude generally has been given to zoning regulations since the time of *Roberge* and *Eubank*. But it would be unjustified to extend such criticisms beyond their legitimate sphere to condemn the principle upon which Appellants here rely. That principle—which is at the heart of all three cases—must be regarded as sound and has been neither overruled nor outdated. Decisions during the past thirty years sustaining certain kinds of legislative delegation of authority to administrative agencies are plainly not in point; it is, in fact, the *lack* of any such official, administrative authority in the promulgation of the Professional Responsibility Rule which the Appellants here attack.

*** For a recent state court decision resting on a similar foundation, see, *e.g.*, *Group Health Ins.* v. *Howell*, 40 N.J. 436, 193 A.2d 103 (1963).

taining that the very notion of law involves the idea of government pursuant to official decision—that is, decision by some duly constituted authority, duty-bound to act with a view to the public good rather than in furtherance of individual interests.

The principle upon which the *Roberge* and *Eubank* decisions rest applies even more forcefully in the circumstances of the present case. The authority exercised by the private individuals involved in *Roberge* represented only the power to veto the building of a nursing home; and in *Eubank*, the power was only that of determining whether or not a building line should be established: the precise location of the line was determined by public authorities. Here, on the other hand, the drafting of the Professional Responsibility Rule was committed to private hands, and the Rule was adopted exactly as approved by the optometrists' vote. The Board of Examiners never exercised its judgment on whether the Rule was in the public interest. Every policy decision, in short, was made by private persons rather than by any official state authority.

Legally effective regulation of businesses and professions may of course be achieved in a variety of ways—by means of direct legislation, commissions, and agencies of many types. And participation in the regulatory process by private members of the regulated business or profession is often entirely permissible and quite useful. See, *e.g.*, *Lathrop* v. *Donohue*, 367 U.S. 820 (1961). However, some procedures must exist which ensure that (1) at least a minimal degree of consideration is given to the need for the regulation in question and to its effect on relevant public and private interests and (2) control over adoption of the rule is exercised at some point by persons with official standing who are clearly responsible for acting in

accordance with the public welfare rather than in furtherance of personal or private interests.

In the present case such safeguards are absent, and the dangers against which they are designed to operate are vividly illustrated. No decision concerning the wisdom or reasonableness of the Rule was made by the Board at any time. Instead, that agency relied entirely upon the "automatic referral" and "presumption of reasonableness" provisions of its Rule Making Procedure Rule. Thus, the Board adopted the regulation, proposed by the unofficial Advisory Committee, simply because the regulation received the approval of two-thirds of the optometrists voicing an opinion; the Board's action was no more than an echo of the self-indulgent preferences expressed by the profession's majority faction.*

No state official or body ever made or even pretended to make any determination that the Rule was in the public interest. Nor did any state authority ever set standards limiting the absolute discretion of the profession in passing on the Rule. (It would have been naive, of course, to expect adherence to any such standard.) Rather, it is clear that the optometrists were completely free to vote in accordance with their personal and economic interests—which were amply demonstrated in organized fashion by the long-time efforts of the TOA to abolish multiple-office practice.

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* The Board did hold a hearing concerning the Rule at which Appellants were allowed to argue that the Rule should not be adopted. However, a hearing at which adoption of the Rule was assured unless its opponents could carry the unprecedented burden thrust upon them of somehow overcoming the presumption of reasonableness and necessity—and at which absolutely no evidence as to the Rule's desirability was presented—surely cannot suffice to make the Board's deference to the state's optometrists anything less than an abdication of its responsibility.

The Rule, in sum, represents merely the predictable desires of a majority faction of the optometrists in Texas.

The vices of the procedures utilized in this case point up the clear distinction between such procedures and more traditional elective methods of legislation, approved and used by several states, such as referendum and initiative. Where the entire electorate passes upon a particular issue, cross-section opinions from every area of society are expressed; and the result is an expression of the public interest. In the present case, only parties with direct economic interests were involved in the decision-making, and their views were never tempered by the views of the electorate as a whole. The power of the independent optometrists was essentially absolute.

The extreme circumstances of the present case call for this Court again to make it clear that due process of law sets limits to private government and that it requires responsible, official decisions to be made concerning matters of such consequence as the right to engage in a business or profession and the degree of competition to be allowed therein.

B. Adoption of the Rule Was Premised on an Unreasonable Presumption.

The presumption created by the Board's Rule Making Procedure Rule—that any proposed rule approved by two-thirds of the state's optometrists who cared to express an opinion is reasonable and in the public interest—is clearly irrational, and therefore the Professional Responsibility Rule should be held invalid under the principle of cases such as *United States* v. *Romano*, 382 U.S. 186 (1965), *Tot* v. *United States*, 319 U.S. 463 (1943), and *Western & A.R.R.* v. *Henderson*, 279 U.S. 639 (1929).

In *Tot*, this Court was presented with a conviction under the Federal Firearms Act, which provided that possession of firearms by certain classes of persons would be "presumptive evidence" that such firearms were "shipped or transported or received" in interstate commerce—a jurisdictional requirement for the statute's application. Finding "no rational connection between the fact proved and the ultimate fact presumed," the Court held the conviction invalid. The Court stated,

> "[W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." * 319 U.S. at 468.

In the *Henderson* case, this principle was applied to the states. The fact of a collision between a train and another vehicle at a highway grade crossing was deemed by a state statute to raise a presumption of negligence on the

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* The principle of cases such as *Tot* and *Henderson* cannot be limited to situations in which the presumption involved is a rule of evidence, applicable to the conduct of litigation. No persuasive reason to impose such a restriction is apparent. The evil of irrationality seems, if anything, more serious when an agency institutes a presumption that any and all suggestions of a particular private group are worthy of being enacted into law; for the undesirable effect of the presumption in such a case—located as it is at the very center of the legislative process, affecting a large number of cases within a general class—is greatly amplified.

This is not to suggest, of course, that the actual reasoning processes of a legislature or an agency are to be judicially scrutinized under a standard of rationality with respect to every enactment. There is a clear distinction between the ordinary situation in which such an authority affirmatively considers and promulgates a rule of law—as to which no such scrutiny is called for—and that involved in the present case, in which the Board of Examiners abdicated that legislative responsibility by means of the presumption in question.

part of the railroad involved; rational connection was again found wanting, and the provision was held invalid on fourteenth amendment grounds.

Here, the preferences of a majority of the state's optometrists were surely more likely to be determined by self-interest than by notions of the public good. The members of the TOA were presented with a golden opportunity; they could, by means of a simple "yes" vote, rid the state of competitors who were able consistently to offer services at more attractive rates than those of higher-cost independent practitioners. And conveniently, they were bound by no oath and had not undertaken the task of working exclusively in the public interest. It would scarcely be unlikely in such circumstances for balanced judgment—including consideration, for example, of the fact that the abolition of multiple-office practice would almost certainly raise the cost of eye care to Texas residents, S.F. 162-64—to be overcome by the force of self-interest. Thus, the majority's preferences cannot be said to bear a rational connection with the conclusion that the Rule approved by them is reasonable and in the public interest.

II. THE RULE IS VOID BECAUSE IT WAS ADOPTED PURSUANT TO A CONSPIRACY TO PUT THE APPELLANTS OUT OF BUSINESS.

In the trial court, Appellants alleged that the Board members who promulgated the Professional Responsibility Rule did so not on the basis of considerations concerning the public welfare, but instead in furtherance of a conspiracy with a majority of the state's optometrists to put the Appellants out of business and thus to promote their own private interests. Tr. 9-10, 27-28; S.F. 142-44. A demonstration of the truth of these allegations would, Appellants contend, establish that the Rule denies them due process of law and

that it is invalid under the supremacy clause as a violation of the Sherman Act. Thus, the Texas Supreme Court's holding that the allegations were irrelevant to the Rule's validity* was in error. Furthermore, regardless of whether the Board members themselves participated in the conspiracy referred to, the Rule would be rendered void as a violation of the federal antitrust laws by virtue of the dominant role played by the conspiring optometrists in its creation and promulgation and the lack of any official decision concerning the wisdom of the Rule.**

A. The Participation of the Board Members in the Conspiracy Denied Appellants Due Process of Law.

It would be difficult to conceive of a more serious deprivation of fourteenth amendment guarantees than that which occurs when administrative officials act on the basis of selfish motives rather than an evenhanded consideration of the public good. The protection of individual rights which is embodied in the procedural requirements of due process

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* In its interlocutory mandamus decision (App. A, pp. 45a-52a; 388 S.W.2d at 413-17 (1965)) the Texas Supreme Court held that, even if the allegations were true, the facts thereby established would not affect the validity of the Rule; and that court refused accordingly to allow the trial judge to make a decision concerning them.

** Under modern concepts of pleading, the allegations of conspiracy were sufficient to raise the federal questions suggested above. It is clear that a conspiracy or agreement among optometrists to eliminate competitors, with its obvious effect on interstate commerce in optical supplies and equipment, would constitute a violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1964). As this court stated in *St. Louis, I.M. & So. Ry.* v. *Starbird*, 243 U.S. 592, 598 (1917), "the Judicial Code does not require that the statute creating the federal right shall be especially set up. The courts take judicial notice of the statute." See generally *Braniff Airways* v. *Nebraska State Bd.*, 347 U.S. 590, 598-99 (1954); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). Moreover, Appellants have consistently argued at every stage of this litigation that they were denied due proces of law.

is rendered meaningless when corruption or self-interest controls the administrative process—as is alleged here by Appellants.

Judicial inquiry into alleged administrative corruption is neither unusual nor difficult. In *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964), an unsuccessful applicant for a liquor license alleged that she had been denied the license, not because she did not meet legitimate requirements or qualifications, but rather because, *inter alia*, she was not "approved" by the aldermen representing the ward in which her store was to be located, as required by an unwritten "ward courtesy" system. The allegations were held by the Fifth Circuit to set out violations of the applicant's fourteenth amendment rights to due process and equal protection of the laws.*

Similarly, bribery would surely call for invalidation of any decisions made as a result of such improper influence. In *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 224 (D.C. Cir. 1959), the District of Columbia Circuit held that "private approaches" to members of the

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* *Accord*, *Glicker* v. *Michigan Liquor Control Comm'n*, 160 F.2d 96 (6th Cir. 1947) (equal protection).

The fact that the present case involves adoption of a rule rather than denial of a license should not render inapplicable the principle thus expressed. For the Professional Responsibility Rule was clearly designed, from start to finish, to apply specifically to Appellants, whose operations have for years constituted the most significant multiple-office optometry practices in Texas. Due process deals with realities, not conceptual categories. And when the design and effect of administrative action is so clearly focused upon a few individuals, as is the case here, the requirements of the fourteenth amendment afford such individuals protection, just as in cases such as *Hornsby*. *Cf.* 1 Davis, Administrative Law §§ 7.02-.03 (1958). *Compare Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289 (1920), *with Morgan* v. *United States*, 298 U.S. 468, 480 (1936), *and Jordan* v. *American Eagle Fire Ins. Co.*, 169 F.2d 281, 285, 287-88 (D.C. Cir. 1948).

Federal Communications Commission "vitiated its action" in assigning certain television channels—despite the fact that the assignment was regarded as rule-making activity. See *Sangamon Valley Television Corp.* v. *United States*, 358 U.S. 49-50 (1958) (per curiam).

The doctrine of *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810), does not bar the result here suggested. That doctrine purports to apply only to—and is properly viewed as limited to—situations in which *legislatures*, either state or federal, are involved. In such situations an attitude of deference to one of the major governmental organs in our political system—holding valid regardless of that body's motives any legislation duly enacted in accordance with prescribed procedures—may be appropriate.* But such deference need not and should not extend to administrative agencies. Innumerable such bodies exist throughout this country, many of which act to a large extent outside the public eye because of either the technical nature or the obscurity of their functions. Shielding the members of each such agency from the sort of scrutiny Appellants here seek could have the effect of validating, unnecessarily and unwisely, many clearly discriminatory actions.

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* This Court's recent decision in *Griffin* v. *School Bd.*, 377 U.S. 218 (1964), makes it plain that even in the case of a state legislature, the motives behind certain enactments can be so clear and so plainly impermissible that they will be judicially recognized and passed upon. In that case, the Court was able to find that the public schools of Prince Edward County, Virginia, "were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school." And, accordingly, the statutory scheme of private education there involved was held unconstitutional. 377 U.S. at 231. See *St. Helena Parish School Bd.* v. *Hall*, 368 U.S. 515 (1962) (per curiam), *affirming* 197 F. Supp. 649 (E.D. La. 1961) (per curiam) (three-judge court); *United States* v. *Constantine*, 296 U.S. 287 (1935).

The consequences of permitting such scrutiny, on the other hand, would be no more dire than those which attend holdings such as *Hornsby*, in the field of licensing. Allegations of misconduct or discrimination must, after all, be proved in order for litigants challenging such action to succeed. And the chances of disruption because of threatened litigation are at least as great in areas such as licensing, where decisions almost always concern individuals intimately, as in rule-making situations similar to that involved here.

The judiciary is often forced to inquire into the motives of individuals. There is no reason to believe that it would be more difficult to determine whether a Board member participated in a conspiracy in restraint of trade than to determine whether the president of a large corporation did so.* The burden put upon one seeking to prove motives such as those here attributed to the independently practicing Board members may properly be a heavy one. Appellants seek only the opportunity to meet that burden.

B. The Conspiracy Renders the Rule Invalid Under the Supremacy Clause as a Violation of the Sherman Act.

Appellants' allegations that the Rule was adopted pursuant to a conspiracy to put them out of business are relevant in still another respect: if the allegations should be found to be correct, the Rule would represent an essential

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* The possible argument that Appellants' contentions would involve the judiciary in an impossibly difficult task—determining the motives of agency officials—is belied not only by *Hornsby* and *Sangamon Valley*, but also by the line of cases beginning with *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). *Yick Wo* established that discriminatory enforcement of a statute fair on its face constitutes a denial of equal protection; the motives of police and other government officials have thus been subject to judicial scrutiny for eighty years without any serious difficulties plaguing the courts.

part of a naked conspiracy to eliminate competitors and—with its clear impact on interstate commerce in optical equipment and supplies—would be invalid under the supremacy clause as a violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964).*

The character of the Rule as an obvious restraint of trade inconsistent with federal law could be disputed only on the ground that it is immunized from application of the Sherman Act by virtue of the involvement of the State of Texas in its adoption. But no such immunization is proper; the only cases suggesting the applicability of such an immunity contemplate state action of quite a different sort than that involved here.

Parker v. *Brown*, 317 U.S. 341 (1943), and *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), have held that the Sherman Act was not intended to forbid all state action with anticompetitive effects. The state schemes upheld in those decisions, however, were programs concededly enacted by official state authorities and designed to serve the public interest.

In *Parker*, adoption of the agricultural regulations challenged on Sherman Act grounds was regarded simply as "an act of government"; no allegations that the regulations were the result solely of an anticompetitive conspiracy were made.** And the *Noerr* case involved a situation in

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* See, *e.g.*, *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of America* v. *FTC*, 312 U.S. 457 (1941).

** It was argued in the *Parker* case that there had been an undue delegation of legislative authority to members of the group regulated. In rejecting this argument and holding that state participation in the program's enactment immunized it from the Sherman Act, however, this Court repeatedly stressed that—just as in *Noerr*—an admittedly official state body had determined that the rule was in the public interest. See 317 U.S. at 352.

which a disinterested, official state authority—the state legislature—clearly made a policy decision that the statute in question would further the public good; it was not contended that the legislators voting in favor of the statute acted out of motives inconsistent with that goal.

Here, on the other hand, it is alleged that the members of the Board who voted to adopt the Professional Responsibility Rule did so specifically and solely in order to achieve the privately beneficial, anticompetitive aim of putting the Appellants out of business. They made no decision that the Rule would be in the public interest. *The very persons who produced the Rule were themselves a part of the conspiracy.* Such action is not the sort that may legitimately assume immunity. This Court emphasized in *Parker* that "the state in adopting and enforcing the [challenged] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly . . . ." 317 U.S. at 352. Yet that is exactly the sort of action with which the Board members are here charged.

Even if the members of the Board are removed from the alleged conspiracy, the Rule would still be invalid. For, as has been outlined above at pp. 13-18, the Rule was created and adopted by the private optometrists of Texas, not by the Board. The state never exercised its essential policymaking role with respect to the Rule, which must be regarded simply as an agreement among private individuals.

The only valid reason for granting immunity under the antitrust laws to a state administrative regulation is the assumption that the state considered the public benefit flowing from the regulation to override whatever anticompetitive effects the regulation might have. Proof, not only

that the public interest was ignored, but also that the motives of those persons who drafted and approved the Rule were solely anticompetitive would destroy this justification for immunity and require invalidation of the Rule.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted, and this case should be given plenary consideration by this Court, with briefs on the merits and oral argument.

Respectfully submitted,

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